

Terrorist Expatriation: All Show, No Bite, No Future



Peter J. Spiro

I agree with the bottom line of Audrey Macklin's excellent kick-off for the Forum. New expatriation measures adopted by the United Kingdom and Canada are ill-advised and possibly unlawful. The UK and Canada moves make for a kind of trendlet, and other states (even human rights-pure Norway) are considering similar measures as the 'foreign fighter' phenomenon captures global attention. Denationalisation of terror suspects clearly merits the attention of scholars and activists; after decades of disuse, states are now stepping back into the practice of forced expatriation. Macklin sets the scene with a primer on recent developments and a powerful critique of the UK and Canadian measures.

But I would get to the destination along another path. I see denationalisation as anachronistic and toothless in the face of diminished conceptions of citizenship as an institution and changed locations of allegiance. The expatriation measures are empty gestures, a kind of counter-terror bravado to make up for the deficiency of more important material responses. Government officials must be seen to be doing something, and so they may (for appearances sake) throw expatriation into the counter-terror toolbox. But expatriation won't advance the counter-terror agenda in any real way. Given the lack of policy advantage, I expect that the human rights critique will suffice to suppress the broad use of denationalisation in this context.

In theory, expatriation could help shore up the boundaries of membership and national solidarity. Terrorist expatriation might be consistent with the historical practice of terminating nationality upon formal transfer of allegiance. This was once the near-universal practice; original nationality was lost automatically upon naturalisation in another state. Military and government service in another country would also typically result in expatriation, even when the other state was a friendly one. This practice helped police the boundaries of community. One could be a member of one or another polity, but not both. States that continue to prohibit dual citizenship still operate on this principle. A Japanese citizen who naturalises as an American, for example, automatically forfeits her Japanese nationality.

One might situate security-related expatriation in this tradition. To the extent that fighting for the Islamic State represents a shift of loyalty incompatible with loyalty to the United Kingdom, expatriation merely reflects social conditions on the ground. Membership in the United Kingdom would be exclusive of membership in forces associated with the Islamic State. Expatriation clarifies the ‘us’ and ‘them’ in a way that clarifies social solidarities and the special obligations that come with co-nationality. (Ayelet Shachar makes a similar argument with respect to ‘hollow’ citizens acquiring citizenship on the attenuated basis of descent.)

But this logic doesn’t map out onto denationalisation in the current security context. There is no citizenship in the Islamic State (ISIL not being a state, the label notwithstanding). One cannot naturalise or be born into ISIL; there is no formal evidence of loyalty or membership. Expatriation doesn’t work without the symmetry. To the extent that only dual nationals are subject to security-related expatriation, the criterion no longer makes any sense: the other citizenship is random, unrelated to the motivation for expatriation. (As Macklin points out, it could lead to a strange dynamic in which states allied against groups such as ISIL could race to expatriate foreign fighters in an effort to offshore putative threats.) The condition then arbitrarily discriminates against individuals on the basis of their dual-citizen status.

That takes care of the only normatively tenable rationale for the expatriation measures. The punitive basis is more easily dispatched. Punitive uses of expatriation have long been condemned. As early as 1958, the U.S. Supreme Court was able to observe that ‘[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.’ The Canadian measure marks a return to the practice of exile. As Macklin argues, non-application to cases in which statelessness would result does not save it from this rap. A person may well feel a deep social attachment to one country while holding alternative nationalities (which themselves may be nominal). The denationalisation of a Canadian citizen long-resident in Canada will feel like banishment even as he holds another nationality, especially to the extent the latter is attenuated.

Finally, the protective rationale for terrorist expatriation makes little sense as a practical matter. The ‘foreign fighter’ problem is largely framed as a problem of return. Citizens radicalised by their experience in Iraq and Syria with brutal ISIL forces will return to their home countries in the West to undertake terror attacks. It’s a potent narrative of weaponised citizens. Without citizenship, these individuals would have no right of re-entry, thus defusing their utility as ISIL operatives.

Or so our politicians would have it. In practice, denationalisation adds little counter-terror value. You can't take away someone's citizenship for being associated with ISIL before you know that he's associated with ISIL. But once the security apparatus is aware of the connection, it will have other, standard counter-terror tools to protect against the threat. There will be the possibility of criminal prosecution in many states on material support charges, with incarceration on conviction. (Canada's punitive scheme can hardly sustain even the pretence of a protective rationale.) Short of prosecution, watch lists and well-practiced surveillance techniques should prevent returning foreign fighters from undertaking terror attacks. Passport revocation and travel bans will help prevent citizens from becoming foreign fighters in the first place.

So terrorist expatriation advances counter-terror efforts not at all. It supplies yet another example of security-related theatre, a feel-good move that will be popular with some voters. (The features are shared with some Western responses to the vastly exaggerated Ebola threat, where politicians must be seen to respond dramatically even if dramatic moves make no sense in policy terms.) Terrorist expatriation is unlikely to have staying power against a powerful human rights critique. The UK and Canadian measures may well fall to legal challenges, domestic or international. Even if they are sustained in court, they are unlikely to be put to broad use. Few other states will follow suit (it is interesting that terrorist expatriation has almost no political traction in the United States, its aggressive counter-terror posturing notwithstanding). The failure will evidence an emerging norm against involuntary expatriation. If states can't make expatriation stick here, they won't be able to make it stick anywhere.

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